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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 651

FRANK HAGUE, Individually and as Mayor of Jersey City, DANIEL J. CASEY, Individually and as Director of Public Safety of Jersey City, HARRY WALSH, Individually and as Chief of Police of Jersey City, and THE BOARD OF COMMISSIONERS OF JERSEY CITY,

Petitioners;

vs.

COMMITTEE FOR INDUSTRIAL ORGANIZATION, STEEL WORKERS ORGANIZING COMMITTEE OF THE COMMITTEE FOR INDUSTRIAL ORGANIZATION, UNITED ELECTRICAL RADIO AND MACHINE WORKERS OF AMERICA, UNITED RUBBER WORKERS OF AMERICA, WILLIAM J. CARNEY, WILLIAM J. TRAYNOR, WILLIAM P. McGINN, SAMUEL MACRI, JAMES P. SWEENEY, DANIEL J. FOLEY and AMERICAN CIVIL LIBERTIES UNION,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

JAMES A. HAMILL,
JOHN A. MATTHEWS,
CHARLES HERSHENSTEIN,
EDWARD J. O'MARA,
Counsel for Petitioners.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Frank Hague, individually and as Mayor of Jersey City, Daniel J. Casey, individually and as Director of Public Safety of Jersey City, Harry Walsh individually and as Chief of Police of Jersey City, and the Board of Commissioners of Jersey City, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the judgment of that Court entered in this case on January 26, 1939, and therefore show as follows:

I. *Summary Statement of Matters Involved.*

A. The street meeting ordinance of Jersey City.

A final decree of injunction was entered in the United States District Court for the District of New Jersey against petitioners on November 7, 1938, in a suit which had been instituted against them by respondents.

The decree, among other things, in substance, enjoined petitioners from: (a) interfering with the holding by respondents of meetings in the open air and in parks except when in reasonable conflict with the public recreational purposes of said parks; (b) withholding protection for said meetings; (c) continuing their expressed refusal to grant permits to certain named individuals; (d) refusing permits for public meetings on the public streets of Jersey City unless and until all street meetings are forbidden; and (e) from aiding or abetting in any manner whatsoever any person to commit or attempt to commit any of the things enjoined by said decree or not to do anything required to be done. The decree enjoined other alleged illegal acts on the part of the petitioners, such, for instance, as forbidding the distribution of circulars,* but all of the questions arising out of these acts, with the exception of the carrying

* In 1924 an ordinance had been adopted by Jersey City forbidding the distribution of circulars in the public streets and other public places (R. Vol. I, p. 22). This ordinance had been held valid by the New Jersey Supreme Court in *Coughlin, et al.* v. *Sullivan*, 100 N. J. L. 42. Subsequent to the filing of the bill of complaint in this case, this Court had held in *Lovell* v. *City of Griffin*, 303 U. S. 444, that to prevent the distribution of circulars violated the 14th Amendment. Since that time the City has not attempted to prevent the distribution of circulars and does not intend to do so. This was stated during the trial of the case and at the argument in the Circuit Court of Appeals.

of placards in a manner which would conflict with the street assembly ordinance, are really now moot because petitioners took the position before the lower courts that they did not intend to continue the same, and, in fact, have not done so. Consequently no argument is made about these matters, except as the carrying of placards may come within the street assembly ordinance. However, petitioners have urged that the Court was without jurisdiction to maintain the entire suit, and, of course, if the Court was without jurisdiction, the injunction as to these other matters would be improper.

On appeal to the Circuit Court of Appeals for the Third Circuit, that Court affirmed the judgment and decree in all respects, except that it eliminated therefrom that portion of provision (d), which made the operation of the injunction with respect to street meetings dependent upon the continued failure of the petitioners herein to adopt and enforce the deliberate policy of forbidding meetings of any kind on any of the public places of Jersey City. The judgment of affirmance was by a divided court.

In the court below respondents complained, *inter alia*, that the petitioner Casey, as Commissioner of Public Safety of Jersey City, had refused to grant to persons acting under the auspices of respondents, permits to speak in the streets and public places of Jersey City. It was alleged that such refusal constituted a deprivation of the rights of respondents under the 14th Amendment to, and other provisions of the Constitution of the United States and the Civil Rights Act (Act of April 20, 1871, c. 22, Sec. 1, 17 Stats. 13, 8 U. S. C., Sec. 43). The District Court sustained respondents' contention and issued an injunction of the purport above set forth. As previously

stated, this was affirmed with the modification which expanded it.

The denial of permits to speak in public places was based upon an ordinance of Jersey City, entitled "An Ordinance to preserve public peace and good order and to prevent riots, disturbances and disorderly assemblage" (R. Vol. I, p. 26)*. Said ordinance was enacted in pursuance of two separate and distinct provisions of the New Jersey Home Rule Act, P. L. 1917, Ch. 152, under which, (1) the Legislature delegated to the governing body of every municipality power to make, amend, repeal and enforce ordinances to "preserve the public peace and order, to prevent and quell riots, disturbances and disorderly assemblages" (R. S. Sec. 40:48-1)*; and, (2) the further power to "prescribe the time, manner in which, and terms upon which, persons shall exercise any privileges granted to them in the use of any street, highway, alley or public place * * *" (R. S. Sec. 40:67-1)*. Under the latter provisions the State of New Jersey has delegated to its municipalities its title, as trustee for the public at large, in and to the public streets and places of such municipalities. *Burlington* v. *Pennsylvania Railroad Company*, 56 N. J. Eq. 259, 261. The question presented on this phase of the case is whether the ordinance conflicts with the federal constitution.

B. Lack of jurisdiction in the trial court over the subject matter.

The bill of complaint alleged that the value of the matter in controversy exceeded $3,000, exclusive of interest and costs. This was challenged by traverse

* See Appendix.

to the answer and by motion to dismiss the bill for lack of jurisdiction. Despite this challenge, no proof whatever as to the value of the amount in controversy was offered by respondents, either as to the damages which they had sustained or might sustain by reason of the acts complained of, or the value of any of the rights of which they alleged they were deprived. Notwithstanding this, the District Court found that the rights of the respondents and each of them alleged to have been interfered with, "have a value as to each plaintiff (respondent) in excess of the sum of $3,000, exclusive of interest and costs." The Circuit Court of Appeals affirmed this holding and also rested jurisdiction upon Section 24 (14) of the Judicial Code, 28 U. S. C. Section 41 (14).

With respect to the alternative claim of jurisdiction under Section 24 (14), petitioners contended below, and respectfully urge here, that the rights "secured" by the federal constitution, within the true intention of said subdivision, connote rights created in the first instance by the United States Constitution, as distinguished from rights which had their origin elsewhere; in other words, rights which appertain to federal citizenship as such, as distinguished from rights which appertain to state citizenship; and that the rights involved in this case are not within that category.

Moreover, petitioners respectfully show, that even if, upon a determination that certain of the causes of action laid in the bill of complaint, are within the category intended by Section 24 (14), whereas others are not, there must be a reversal of the judgment and decree below, since the several fact situations upon which the respective causes of action are based, are separate and distinct and the existence

of jurisdiction with respect to one such cause does not warrant the retention of jurisdiction by the district court as to the others. *Hurn* v. *Oursler*, 289 U. S. 238, 246; *Geneva Furniture Co.* v. *S. Karpen & Bros.*, 238 U. S. 254.

II. *Reasons Relied on for the Allowance of the Writ.*

1. The majority of the Circuit Court of Appeals for the Third Circuit has decided that the ordinance here in question conflicts with the 14th Amendment to the Constitution of the United States, and in this respect its decision is in direct conflict with the decision of the United States Supreme Court in the case of *Davis* v. *Massachusetts*, 167 U. S. 43. That case arose upon an appeal from the holding of the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Davis*, 162 Mass. 510, to the effect that an ordinance of the City of Boston which required a permit issuable at the discretion of the Mayor, as a prerequisite of the right to speak on Boston Common, was valid and that it was a proper exercise of the power delegated to the municipality by the legislature. On appeal to this Court the ordinance was expressly sustained against the charge that it violated the 14th Amendment, and it was held that the decision of the court of last resort of Massachusetts, to the effect "that no particular right was possessed by the plaintiff in error to the use of the common"; was "conclusive of the controversy", entirely aside from the fact that, "the power conferred upon the chief executive officers of the City of Boston by the ordinance in question may be fairly claimed to be a mere administrative function vested

in the Mayor in order to effectuate the purpose for which the common was maintained and by which its use was regulated." This decision has not been expressly overruled or modified, nor, so far as petitioners can perceive, impliedly, by any subsequent decision of this Court. There is thus presented a situation in which the Circuit Court of Appeals has decided a question of federal constitutional law in a way directly in conflict with an applicable prior decision of this Court.

2. The decision of the majority of the Circuit Court of Appeals for the Third Circuit is in direct conflict with the decisions of the New Jersey Court of Errors and Appeals and the New Jersey Supreme Court in *Harwood* v. *Trembley*, 97 N. J. L. 173 and *Thomas* v. *Casey*, 121 N. J. L. 185. In the latter of these cases, the same ordinance was before the court as is involved in this case. In both cases it was held to be the law of New Jersey that the highways may not be used for the holding of public meetings without permission of the public officials in charge of such highways. In the latter case this rule was held to apply to public places "such as highways and parks." These cases further held that the constitutional guarantee of liberty of speech does not authorize a citizen to use the public property of a community "for the purpose of exercising that guarantee."

There is thus presented a very important question of constitutional law which two courts exercising jurisdiction in the same area have decided differently, the decision of the Circuit Court of Appeals being furthermore, as indicated above, at variance with the decision of this Court in *Davis* v. *Massachusetts*, 167 U. S. 43.

3. Both the District Court and the majority of the Circuit Court of Appeals held that, even if the ordinance were valid, nevertheless it had been administered in an unconstitutional manner. On a set of facts showing that a danger of disorder which might result from the granting of a permit in that case was far less likely than in the case at bar, the New Jersey Supreme Court, in *Thomas* v. *Casey, supra* (121 N. J. L. 185), refused to compel the Director of Public Safety to issue the requested permit. The Court said (p. 192):

> "The director of public safety knows the temper of the people he serves. The record indicates that many citizens have strongly protested against the use of the public highways for a demonstration by the Socialist party. Veteran organizations have filed petitions of protest. That the police could quell any disorder is no reason to grant a permit which might lead to disorder and a possible injury to innocent persons. The public are entitled to their tranquillity, and the discretion to issue the permit in question is vested in the chosen representatives of the city.
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> * * *
>
> "Where, as here, the issuance of a permit rests in the sound discretion of a municipal officer, his action will not be lightly disturbed. There is nothing in the record that indicates that the director's refusal was arbitrary or capricious. He made a thorough investigation and believes that disturbances would result if the permit was granted."

It is thus manifest that on this phase of the case, as well as that relating to the validity of the ordinance, the majority of the Circuit Court of Appeals

and the Supreme Court of New Jersey are in direct conflict. This conflict between Courts exercising jurisdiction within the same area should be authoritatively settled by this Court.

4. The District Court found that it was vested with jurisdiction in the premises, under Section 24 (1) of Judicial Code (U. S. C. Title 28, Section 41 (1)) and that the jurisdictional minimum amount in controversy of $3,000 was involved in this case, notwithstanding that the allegation of the bill to that effect was challenged by petitioners, and although no evidence as to damage or value was introduced. This decision was affirmed by the majority of the Circuit Court of Appeals. Both decisions are in conflict with the decisions of this Court in *Smith* v. *Adams,* 130 U. S. 167; *Wheless* v. *St. Louis,* 180 U. S. 379; *Kurtz* v. *Moffitt,* 115 U. S. 487, construing that provision of the Judicial Code. In attempting to distinguish these applicable decisions furthermore, the Circuit Court of Appeals has misconstrued the scope and effect of other decisions of this Court, to wit, *Wiley* v. *Sinkler,* 179 U. S. 58; *Nixon* v. *Herndon,* 273 U. S. 536; *Barry* v. *Edmunds,* 116 U. S. 550.

5. The Circuit Court of Appeals also found that the District Court had jurisdiction by virtue of Section 24 (14) of the Judicial Code (U. S. C. Title 28, Sec. 41 (14)). This holding, it is submitted, is in conflict with *Holt* v. *Indiana Mfg. Co.,* 176 U. S. 68, and the lower court decisions in *Marcus Brown Holding Co.* v. *Pollak,* 272 Fed. 137 (D. C. S. D. N. Y.), and *Gobitis* v. *Minersville School,* 21 Fed. Supp. 581 (D. C. E. D. Pa.). The question as to the exact line of demarcation between cases which fall

within Section 24 (1) and Section 24 (14) is an important one. Manifestly, they cannot be construed to cover the same ground. Exactly what constitutional rights are covered by Section 24 (14) should be authoritatively settled by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings in this cause to the end that the same may be reviewed and determined by this Court according to law; and that your petitioners may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with law, and that the said judgment and decree of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

Dated, February 7, 1939.

JAMES A. HAMILL,
JOHN A. MATTHEWS,
CHARLES HERSHENSTEIN,
EDWARD J. O'MARA,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court for the District of New Jersey is reported in 25 Fed. Supp. 127 and will be found at page 72, Vol. I of the Record; the opinion of the Circuit Court of Appeals for the Third Circuit has not yet been reported but will be found on page 109, Vol. IV of the Record.

Jurisdiction.

This Court's jurisdiction is invoked under Act of Congress, February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. Sec. 347a, Judicial Code Sec. 240a).

Statement of the Case and Questions Involved.

The petition for writ of certiorari contains a statement of the questions involved in this case, as well as of all the facts material to their consideration.

Specifications of Errors.

The Circuit Court of Appeals erred:—

1. In holding that the Jersey City street meeting ordinance adopted April 15, 1930 is unconstitutional on its face as repugnant to the due process clause of the Fourteenth Amendment.

2. In holding that the said ordinance has been administered in an unconstitutional or discriminatory manner.

3. In holding that jurisdiction over all or some of the causes of action laid in the bill of complaint was properly assumed by the District Court under Judicial Code, Section 24 (1).

4. In holding that jurisdiction over all or some of the causes of action laid in the bill of complaint was properly assumed by the District Court under Judicial Code, Section 24 (14).

5. In holding that respondents were not barred of the right of relief in equity for unclean hands.

6. In failing to reverse the decree of injunction in the District Court on the ground that same is vague and impracticable of enforcement by the Court.

Summary of Argument.

A summary of the argument will be found in the captions to the points hereinafter advanced.

Argument.

I.

The decision of the Circuit Court of Appeals in respect to the street meeting ordinance is in conflict with the decision of this Court in *Davis v. Massachusetts*, 167 U. S. 43; an important question of constitutional law is thus presented which should be settled by this Court.

The principal point in controversy between the respective parties is that which relates to the constitutionality under the United States Constitution of the

ordinance adopted by the City of Jersey City, entitled, "An Ordinance to preserve public peace and good order and to prevent riots, disturbances and disorderly assemblage."* This ordinance provides in effect that no public parades or public assemblies in or upon the public streets, highways, public parks or public buildings of the city shall take place or be conducted until a permit shall have been obtained from the Director of Public Safety. The Director of Public Safety is authorized to grant a permit for parades and public assemblages upon application made to him at least three days prior to the proposed parade or assembly, and he is also authorized to refuse to issue said permit, when, after an investigation of the facts and circumstances pertinent to said application, he believes it would be proper to refuse the issuance thereof, provided, however, that the said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage.

It is to be noted that this ordinance does not concern itself with speech at all. It does not attempt to regulate what may or may not be said. It is designed merely to regulate the manner in which the streets and public places of the city may be used.

This ordinance was enacted in pursuance of two separate and distinct provisions of the so-called Home Rule Act of the State of New Jersey, under one of which (R. S., Sec. 40:48-1)* the legislature has delegated to the governmental body of every municipality power to make, amend, repeal and enforce ordinances to "preserve the public peace and order, to prevent and quell riots, disturbances and disorderly assemblages;" the other (R. S., Sec. 40:67-1)*, "to prescribe

* See appendix.

the time, manner in which, and terms upon which, persons shall exercise any privileges granted to them in the use of any street, highway, alley or public place. * * *" In pursuance of this ordinance the petitioner, Daniel J. Casey, Commissioner of Public Safety of the City of Jersey City, examined said applications for the holding of street meetings in public places, investigated the circumstances surrounding said applications, and, in his discretion, denied the permits sought. It is apparent from this recital that this case in no aspect involves the right to speak, assemble or meet freely or the deprivation of those rights by petitioners. Charges laid in the bill alleging a conspiracy upon the part of petitioners to effect a general deprivation of the right to meet in private places in the city were not found to be substantiated by the trial court and such charges are not an issue upon this application. Petitioners respectfully maintain that the narrow question presented, with respect to the issue of meetings and assemblies on public streets or property, has been definitely determined by the Supreme Court of the United States in *Davis* v. *Commonwealth of Massachusetts,* 167 U. S. 43, and that the decision of the Circuit Court of Appeals for the Third Circuit in the present case, holding that the Jersey City ordinance is unconstitutional on its face, is squarely in conflict therewith.

The *Davis* case, referred to *supra,* was the outcome of the making of a public address by one Davis, on Boston Common, without obtaining a permit for that purpose from the Mayor of the city, as required by the applicable Boston ordinance. On appeal from a conviction for the violation of the ordinance it was contended that it not only constituted a violation of the defendant's general rights under the Fourteenth

Amendment to the United States Constitution, but that, as an ordinance, it was void because arbitrary and unreasonable in that it vested in the mayor the uncontrolled discretion to determine when he would grant a permit. *The Supreme Judicial Court of Massachusetts,* 162 Mass. 510, speaking through Mr. Justice Holmes, overruled exceptions to the judgment of the lower court in which the conviction of Davis took place, holding:

> "* * * That such an ordinance is constitutional * * * does not appear to us open to doubt. To say that it is unconstitutional * * * assumes that the ordinance is directed against free speech generally * * *, whereas in fact it is directed toward the modes in which Boston Common may be used. There is no evidence before us to show that the power of the legislature over the common is less than its power over any other park dedicated to the use of the public, or over public streets, the legal title to which is in a city or town. *Lincoln* v. *Boston,* 148 Mass. 578, 580, 20 N. E. 329. As a representative of the public, it may and does exercise control over the use which the public may make of such places, and it may and does delegate more or less of such control to the city or town immediately concerned. *For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.*" (Italics supplied.)

On the appeal to this Court (*Davis* v. *Commonwealth of Massachusetts, supra*) Mr. Justice White, after citing with approval the above-quoted language of Mr. Justice Holmes, said:

> "It is therefore conclusively determined there

was no right in the plaintiff in error to use the Common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe. The 14th Amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control (*Barbier* v. *Connolly*, 113 U. S. 27, 31 (28:925); *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26, 29 (32:585, 586); *Giozza* v. *Tiernan*, 148 U. S. 657 (37:599); *Jones* v. *Brim*, 165 U. S. 180 (41:677), and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the Constitution and laws of the State."

The court said further:

"The assertion that although it be conceded that the power existed in the state or municipality to absolutely control the use of the Common, the particular ordinance in question is nevertheless void because arbitrary and unreasonable in that it vests in the mayor the power to determine when he will grant a permit, in truth, whilst admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."

Petitioners will not burden this brief with an exposition of the majority decisions throughout the country which are in accord, with respect to the constitutionality of ordinances akin to that under examination.

Before analyzing the decrees of the District and Circuit Courts in this case, in the light of the deter-

mination of this Court in the *Davis* case, it will be noted that the latter authority stands for two distinct propositions; (a) individuals have no general constitutional right to speak or assemble in public places, contrary to prohibitory regulations of municipalities, acting under proper delegation of authority; (b) arbitrary application of such ordinances cannot be complained of by individuals, since the greater power, of absolute and proprietary control, contains the lesser, of arbitrary or discriminatory application.

So far as is material to this petition, however, *i. e.*, to a showing of conflict between the Circuit Court of Appeals and an applicable prior ruling of this Court, only (a), the first proposition above noted, is important, since the *holding* of the Circuit Court, as distinguished from its general remarks concerning discriminatory application of the ordinance by petitioners, was that there does exist a general constitutional right to speak or assemble in public streets, municipal ordinances or state statutes to the contrary notwithstanding. This becomes apparent upon close examination of the extension of the operation of the decree of the District Court, as entered by the Circuit Court of Appeals. The injunction entered in the District Court granted respondents an absolute right with respect to the holding of meetings or assemblies only so far as parks in Jersey City were concerned, whereas, with respect to public streets or highways, the right decreed was granted only until and unless the defendants in their official capacities should adopt and enforce the deliberate policy of forbidding meetings of any kind on the streets of the city. On appeal, the Circuit Court eliminated the conditional or contingent feature of the injunction

as it applied to the adjudicated right of plaintiffs to meet in public streets, under the theory that the ordinance was void on its face.

While admitting that its conclusion as to the unconstitutionality of the Jersey City ordinance was at variance with that of this Court in the *Davis* case, the Circuit Court of Appeals nevertheless departed from the rule of that case, under the supposed authority of the later United States Supreme Court cases, to wit: *Gitlow* v. *New York*, 268 U. S. 652; *Fiske* v. *Kansas*, 274 U. S. 380; *De Jonge* v. *Oregon*, *supra*; *Near* v. *Minnesota*, *supra*; and *Lovell* v. *City of Griffin*, 303 U. S. 444. Petitioners respectfully contend, however, that the cited cases of this Court were concerned solely and exclusively with the protection of the rights of free speech, free press and free assembly, *qua* free speech, free press, and public assembly. They hold that, within the purview of the due process clause of the 14th Amendment, a state may not deny the fundamental constitutional rights in question, upon standards or for reasons based upon anticipated public disorder. The case of *Lovell* v. *City of Griffin*, *supra*, merely upholds the constitutional right to distribute circulars and leaflets, as against the provision of a municipal ordinance which prohibits such distribution absolutely, and without regard to whether such distribution might constitute a littering of the streets or an offense to public order. None of them have the slightest application to the peculiar problem presented in this case, which is the determination of the line which must be drawn between the proprietary right and correlative duty of a municipality, under authority delegated to it by the state, of regulating or prohibiting use of public

streets for purposes other than traffic, and of public parks for purposes other than those of normal recreational activities, on the one hand, and the legitimate exercise by persons of their constitutional rights to freedom of speech, press and assembly on the other. This case presents the opportunity for a definitive drawing of such a line by this Court. A writ of certiorari ought to issue under Rule 38 of the Rules of the Supreme Court, since the Circuit Court of Appeals for the Third Circuit "has decided a federal question in a way probably in conflict with applicable decisions of this Court"; or, at the least, "has decided an important question of federal law which has not been, but should be, settled by this Court;".

II.

The decision of the Circuit Court of Appeals in respect to the street meeting ordinance is also in conflict with the decisions of the courts of New Jersey in *Thomas* v. *Casey*, 121 N. J. L. 185 and *Harwood* v. *Trembley*, 97 N. J. L. 173; an important conflict between Appellate Courts exercising jurisdiction in the same State is thus presented which should be settled by this Court.

A portion of the record in the case at bar related to two applications for street meetings by Norman Thomas, both of which were denied. To test the validity of the denial of the second application, Thomas brought mandamus proceedings in the New Jersey Supreme Court to compel the defendant Casey to grant him a permit, and in said proceedings he attacked the constitutionality of the same ordinance which both the District Court and Circuit Court con-

sidered in the instant case. The Court declared the ordinance constitutional in an opinion handed down on October 18th last, *Thomas* v. *Casey*, 121 N. J. L. 185, and denied the writ of mandamus. In the course of the Court's opinion, Mr. Justice Bodine said (p. 190):

> "The present case in no sense involves the relator's right to speak as he pleases within the confines of the state and federal constitutions. However, he may not speak in public places in Jersey City without the permit of the properly constituted authorities, even though with such permit he would be justified in making the speech intended. The public have a right to the uninterrupted enjoyment of the highways and parks maintained at public expense."

The Court then proceeded to quote with approval the language of Chief Justice Gummere, writing for the New Jersey Court of Errors and Appeals in *Harwood* v. *Trembley*, 97 N. J. L. 173, wherein the Court said:

> "* * * The streets of a city are common highways, primarily designed for the use of the public in passing and repassing and in such temporary occupancy as is incidental to the exercise of those rights. No one is justified in obstructing a public street by collecting therein a large assemblage of people for the purpose of delivering an address to them. The common highways of the state are not designed for the purpose of holding public meetings therein, and anyone who attempts to do this, without having first obtained permission from the public authorities in charge of such highways, commits a public nuisance. The constitutional guaranty of liberty of speech no

more authorizes a citizen to appropriate to his own use the public property of a community for the purpose of exercising that guaranty than it permits him to occupy *in invitum* the private property of a fellow citizen for the same purpose."

In view of these determinations by the New Jersey courts that respondents have no absolute right to hold public meetings in the streets, highways, parks and other public places of a municipality, it becomes desirable and expedient that this Court should issue its writ of certiorari in order to resolve the conflicting points of view between federal and state courts in the same territorial jurisdiction with respect to an important matter of public law affecting private rights.

III.

Certiorari should issue because the Circuit Court of Appeals has construed Judicial Code, Sections 24 (1) and 24 (14) in conflict with applicable decisions of this Court and with the weight of authority in the inferior federal courts.

As set out in the petition, petitioners attacked the assumption of original jurisdiction by the District Court in this matter and were met by respondents' argument to the effect that jurisdiction could be based upon a number of grounds, but in particular, upon the provisions of Judicial Code, Section 24 (1) and (14) (28 U. S. C. Sec. 41 (1) and 41 (14)). In affirming the judgment and decree of the District Court, the Circuit Court of Appeals concluded that the issue of jurisdiction had to be resolved in

favor of respondents on the ground that either of the sections cited vested jurisdiction in the District Court without mentioning the several other bases for jurisdiction contended for by respondents in their brief. We therefore address our discussion under this point, only to the sections cited.

Section 24 (1) provides for original jurisdiction in the Federal District Court in all suits of a civil nature at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, if the suit arises under the constitution or laws of the United States.

Section 24 (14) provides that original jurisdiction may be assumed by the Court without regard to the $3,000 jurisdictional requirement, in suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any State law, statute, ordinance, etc., of any right, privilege or immunity *secured* by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Paragraph 6 of the Bill of Complaint contains the jurisdictional allegations applicable to Section 24 (1), aforementioned, and paragraph 7 of the Bill makes the *pro forma* recitals designed to meet the requirements of Section 41 (14). These allegations were brought into issue below by the appellants, first, by direct traverse in the answer, and secondly, by motion to dismiss the bill for lack of jurisdiction, which was denied by the trial court.

The jurisdiction of the Court below having been brought into issue by defendants, it was incumbent upon the trial court to require proof of the juris-

dictional facts, and its failure to do so constitutes error. The federal district courts must assure themselves of federal jurisdiction in every case before them. *Miller* v. *First Service Corp.*, 84 F. (2d) 580 (C. C. A., N. D., 1936).

In *Kvos* v. *Associated Press*, 299 U. S. 269, the Supreme Court expressly held that general averments were insufficient to carry plaintiff's burden of establishing the jurisdictional minimum in the face of proper attack by the defendant.

Petitioners contend that the rights with respect to which plaintiffs sought redress for grievances below were not shown to have a value in excess of $3,000; *i. e.*, under controlling decisions of this Court, the rights claimed do not have a pecuniary value or consequence, calculable in money, and immediately, not remotely or contingently dependent upon the litigation. The trial court and the majority of the Circuit Court of Appeals were therefore in error in finding that Section 24 (1) of the Judicial Code, warranted an assumption of jurisdiction. The rule stated is supported by the following decisions of this Court, *Smith* v. *Adams*, 130 U. S. 167; *Wheless* v. *St. Louis*, 180 U. S. 379; *Kurtz* v. *Moffitt*, 115 U. S. 487; *Healy* v. *Ratta*, 292 U. S. 263; *Youngstown Bank* v. *Hughes*, 106 U. S. 523; *New England Mortgage Security Co.* v. *Gay*, 145 U. S. 123.

Respondents sought to meet the rule contended for by petitioners by arguing that litigation having to do with the redress of grievances affecting civil rights, generally, necessarily concerned rights presumably of a value in excess of the jurisdictional amount, citing such cases as, *Wiley* v. *Sinkler*, 179 U. S. 58 and *Nixon* v. *Herndon*, 273 U. S. 536. The Circuit Court adopted this view. Petitioners maintain that the cited cases

are applicable only to suits involving interference with the right of citizens to vote; that such a right is one which at common law founded a tort action for damages, and that, therefore, the rule concerning the existence of presumptive jurisdictional minimum in such cases is merely an application of the general rule that tort actions for unliquidated damages in the federal courts will be deemed to comply with the requirement of jurisdictional minimum, where the requisite amount is set forth in the *ad damnum* clause of the complaint. The cited cases obviously do not furnish any support to the view that civil or political rights, generally, may form the basis for actions in the federal district courts without establishing, against objection, the actual existence of the requisite jurisdictional amount in controversy. See *State of Ohio* v. *Cox*, 257 Fed. 334. In view of the disregard of applicable decisions of this court, and the misconstruction of others, by the Circuit Court in construing Judicial Code, Section 24 (1), in this case, a proper ground for the issue of the writ of certiorari is indicated.

Even more cogent grounds for the issuance of a writ of certiorari in this case are found in the construction by the Circuit Court of Appeals of the alternative provision relied upon by respondents for the vesting of jurisdiction in the District Court, Section 24 (14) of the Judicial Code. The rights "secured" by the federal constitution, with respect to which, under said section, an action may be instituted in the district courts without a showing of jurisdictional minimum, have been authoritatively construed by this Court, on the basis of prior decisions by the Court, as meaning rights which were created in the first instance by the United States Constitution, *i. e.*, rights

appertaining to national as distinguished from state citizenship, and not such rights as spring from sources other than the federal constitution. This construction of the section was announced by the Supreme Court of the United States in the case of *Holt* v. *Indiana Manufacturing Co.*, 176 U. S. 68, relying upon earlier decisions of this court in the *Slaughter House Cases*, 16 Wall. 36 and *U. S.* v. *Cruikshank*, 92 U. S. 542. The construction contended for finds further support in the recent decision of this Court in *Hamilton* v. *Regents University of California*, 293 U. S. 245, at page 261, and was expressly followed by the lower court decisions of *Marcus Brown Holding Co.* v. *Pollak*, 272 Fed. 137 and *Gobitis* v. *Minersville School District*, 21 Fed. Supp. 581. The only indication to the contrary is in the case of *Smith* v. *U. S.*, 157 Fed. 721. In that case, however, the consideration of the question was only by way of dictum, the jurisdictional right involved being that of a negro citizen of the United States to enjoy freedom from involuntary servitude, which was a right secured in the first instance by the 13th Amendment to the United States Constitution and therefore a proper basis for jurisdiction under Section 24 (14), under the construction of the section previously adopted by this Court in the *Holt* case, *supra*. The *Smith* case is the sole authority relied upon by the Circuit Court of Appeals below in support of its conclusion that the word "secured" in Section 24 (14) has reference to any rights protected or guaranteed by the federal constitution, regardless of their genesis. The opinion of the Circuit Court below does not even attempt to explain or distinguish the applicable ruling of this Court to the contrary in *Holt* v. *Indiana Manufacturing Co.*, *supra*.

Since the rights involved in these proceedings, free-

dom from physical molestation and from exclusion from the state while engaged in labor organizational activities, and the claimed rights of freedom of speech, of press, and of public assembly, are all rights which had their origin in the several states prior to the adoption of the federal constitution, and are merely additionally guaranteed against state invasion or deprivation under the 14th Amendment, they furnish no basis for the assumption of original jurisdiction by the district court in this case under Section 24 (14) of the Judicial Code, *supra*.

Even if it should be determined that the causes of action laid in the bill of complaint respecting arbitrary and unlawful exclusions of certain of the plaintiffs from Jersey City, or kindred causes of action, constitute deprivations of rights "secured", under the authentic construction of the word as used in Section 24 (14), by the federal constitution or by laws of the United States dealing with equal rights of citizens of the United States, nevertheless petitioners respectfully contend that so far as the separate and distinct cause of action based upon the denial of permits for street meetings and assemblies is concerned, the foundation thereof being claimed to rest on the constitutional rights of free speech and assembly, those rights are indubitably attributes of state citizenship, not springing in the first instance from the federal constitution, but having their genesis in state citizenship prior to the adoption of the federal constitution. Therefore, the assumption of jurisdiction by the District Court under Section 24 (14) of the Judicial Code with respect to that cause of action, was unquestionably erroneous, and justifies a reversal of the judgment and decree below, so that those portions of the decree which pertain to street meetings and assemblies may be elimi-

nated therefrom. Such procedure is indicated by the decision of this Court in the case of *Geneva Furniture Mfg. Co.* v. *S. Karpen & Bros.*, 238 U. S. 254. That the causes of action are separable, so that the existence of federal jurisdiction as to one, does not warrant an assumption of jurisdiction as to others not founded upon any applicable provision of the Judicial Code, authentically construed, is determined by the rule of this Court laid down in the case of *Hurn* v. *Oursler*, 289 U. S. 238.

In view of the foregoing, the construction arrived at by the Circuit Court of Appeals as to the meaning of the word "secured" in Section 24 (14) of the Judicial Code, is basic to its decision, and because of the obvious conflict between the rule adopted by the Circuit Court of Appeals, and that laid down by this Court in the *Holt* case, *supra*, and in other decisions of the inferior federal courts in accord, the issuance of the writ of certiorari to review such judgment and decree of the Third Circuit Court becomes peculiarly appropriate.

IV.

Certiorari should issue in this case because public policy requires a prompt determination by this Court of the respective rights and duties of municipalities in regulating and controlling the use of public streets and places, on the one hand, and the relation thereof to the fundamental rights of free speech, assembly and press, on the other.

Respondents have contended as a ground for the issuance of a writ of certiorari by this Court in an earlier phase of the present proceedings that no case in which the writ has heretofore been granted prior

to the judgment of the intermediate appellate court involved issues of greater public importance than those involved in this case. While not ready to go to the extent of such a position, and certainly not on the grounds contended for on the former application by respondents, petitioners nevertheless concur in the view that the issues involved herein are of great public importance. As indicated hereinabove, petitioners do not conceive that this case, properly considered, involves the existence of the constitutional rights of free speech, assembly and free press or the scope of protection to which they are entitled. Petitioners are in complete accord with the views expressed by the courts below, and by respondents on the earlier application for writ of certiorari to this Court, that the fundamental civil liberties in question must be afforded the fullest degree of protection and enjoyment. This case, however, does not involve them. The issues have been beclouded by respondents in the form of such general assertions as that the right of persons freely to assemble and speak in Jersey City has been denied by the municipal authorities. Such characterizations are patently untrue. No case is made on the record of a suppression of meetings or of freedom of speech or assembly on *private* property, whether in buildings or in open places. If there were, petitioners readily concede that their position would be indefensible. The sole issue in this case which divides the parties, is the extent to which *public* streets and places shall be made a forum for large gatherings of persons upon particular occasions.

The solution of that issue is one which, within its limited scope, merits a definitive solution by this

Court, and petitioners therefore respectfully urge it as a cogent ground for the issue of certiorari in this case.

Respectfully submitted,

JAMES A. HAMILL,
JOHN A. MATTHEWS,
CHARLES HERSHENSTEIN,
EDWARD J. O'MARA,
Counsel for Petitioners.

Appendix.

"AN ORDINANCE TO preserve public peace and good order, and to prevent riots, disturbances and disorderly assemblage.

The Board of Commissioners of Jersey City DO ORDAIN:

1. From and after the passage of this ordinance, no public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City shall take place, or be conducted until a permit shall be obtained from the Director of Public Safety.

2. The Director of Public Safety is hereby authorized and empowered to grant permits for parades and public assembly, upon application made to him at least three days prior to the proposed parade or public assembly.

3. The Director of Public Safety is hereby authorized to refuse to issue said permit when, after investigation of all of the facts and circumstances pertinent to said application, he believes it to be proper to refuse the issuance thereof; provided, however, that said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage.

4. Any person or persons violating any of the provisions of this ordinance shall upon conviction before a police magistrate of the City of Jersey City be punished by a fine not exceeding two hundred dollars or imprisonment in the Hudson County Jail for a period not exceeding ninety days or both.

5. This ordinance shall take effect upon its final passage.

Introduced April 1st, 1930.
Adopted April 15th, 1930.

JOHN BEGGANS,
MICHAEL I. FAGEN,
ARTHUR POTTERTON,
WILLIAM B. QUINN,
FRANK HAGUE,
Commissioners.

Dated, City Clerk's Office,
Jersey City, April 21st, 1930.

EDWARD J. HOLLAND,
City Clerk."

Appendix.

REVISED STATUTES OF NEW JERSEY.

"40:48-1. *Ordinances: general purpose.* The governing body of every municipality may make, amend, repeal and enforce ordinances to:

* * * * * * *

Maintain order. 6. Prevent vice, drunkenness and immorality; to preserve the public peace and order; to prevent and quell riots, disturbances and disorderly assemblages;"

"40:67-1. *Ordinances relating to.* The governing body of every municipality may make, amend, repeal and enforce ordinances to:

* * * * * * *

Use of streets; digging. c. Prescribe the time, manner in which and terms upon which persons shall exercise any privilege granted to them in the use of any street, highway, alley or public place, * * *"